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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1279

No. 24

FEB 20 1969
CHARLES

STEPHEN J. ROTH, Attorney General, Successor to EUGENE F. BLACK, Attorney General, in the name and on behalf of the People of the State of Michigan,
Appellant,

vs.

PRESTON DELANO, Comptroller of the Currency of the United States of America, and

JOSEPH T. CONNOLLY, as Receiver of the First National Bank—Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America,
Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

STEPHEN J. ROTH,
Attorney General,
EDMUND E. SHEPHERD,
Solicitor General,
ARCHIE C. FRASER,
Assistant Attorney General,

State Capitol,
Lansing 2, Michigan,

JULIUS H. AMBERG,
Special Asst. Attorney General,
500 Mich. Trust Bldg.,
Grand Rapids 2, Michigan,

INDEX

SUBJECT INDEX

	Page
Prior Decisions Are Not Controlling	1
The State Act Was Held Invalid	4
The Necessary Party Is before the Court	10
The Decision Below Is Erroneous	11
The Case Involves a Substantial Question	13

CITATIONS

Cases:

American Surety Co. vs. Bethlehem National Bank, 314 U. S. 314	10, 12
Anderson National Bank vs. Luckett, 321 U. S. 233	5, 12, 13
Armstrong vs. American Exchange National Bank, 133 U. S. 433	10
Baltimore National Bank vs. State Tax Commission, 296 U. S. 538	7
Black vs. Delano, 170 F. 2, 966	2, 5, 6
Bradford Electric Light Co. vs. Clapper, 284 U. S. 221	9
Case vs. Bank, 100 U. S. 446	10
Charleston Federal Savings & Loan Assn. vs. Alderson, 324 U. S. 182	7
Chassaniol vs. Greenwood, 291 U. S. 584	8
Cox vs. Hart, 260 U. S. 427	5
Dahnke-Walker Co. vs. Bondurant, 257 U. S. 282	8
Davis vs. Elmira Savings Bank, 161 U. S. 275	6
Earle vs. Conway, 178 U. S. 456	10, 12
Easton vs. Iowa, 188 U. S. 220	6
Evans Products Company vs. State Board, 307 Mich. 506	5
First National Bank vs. Missouri, 263 U. S. 640	13
First National Bank of San Jose vs. California, 262 U. S. 366	2
Fleming vs. Rhodes, 331 U. S. 100	8
Furst vs. Brewster, 282 U. S. 493	8

	Page
Gamble vs. Daniel, 281 U. S. 705	8
In re Commercial National Bank, 45 F. Supp. 482 (E. D. Pa.), aff'd. on opinion below, 134 F. 2, 172	3
Lawrence vs. State Tax Commission, 286 U. S. 276	7
Madden vs. Kentucky, 309 U. S. 83	9
McClellan vs. Chipman, 164 U. S. 347	13
Memphis Natural Gas Co. vs. Beeler, 315 U. S. 649	7
Merrill vs. National Bank of Jacksonville, 173 U. S. 131	10, 12
National Bank vs. Commonwealth, 9 Walk 353	13
North Dakota vs. Olson, 280 U. S. 528	9
P. J. Carlin Construction Co. vs. Heaney, 298 U. S. 637	9
Poindexter vs. Greenhow, 114 U. S. 270	8
Provident Institution for Savings vs. Malone, 221 U. S. 660	5, 11, 12
RFC vs. Beaver County, 328 U. S. 204	9
Reeves vs. Williamson, 317 U. S. 593	9
Richfield Oil Corp. vs. State Board, 329 U. S. 69	8
Rushton vs. Schram, 143 F. 2, 554 (C.C.A. 6th)	2, 4, 8
Security Savings Bank vs. California, 263 U. S. 282	11, 12, 13
Senn vs. Tile Layers Protective Union, 301 U. S. 468	8
St. Louis, etc., Ry. Co. vs. Wynne, 224 U. S. 354	8
Starr vs. O'Connor, 118 F. 2, 548 (C.C.A. 6th)	2, 10
Starr vs. Schram, 143 F. 2, 561 (C.C.A. 6th)	2, 5
State Farm Mutual Ins. Co. vs. Duel, 324 U. S. 154	8
Taylor vs. Spurway, 72 F. 2, 97 (C.C.A. 5th)	10
United States vs. Klein, 303 U. S. 276	5, 10, 12

Statutes:

12 U. S. Code, Sec. 194	3, 12
28 U. S. Code, Sec. 1254(2)	4, 7, 9, 14
Sec. 1257(2)	7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 566

STEPHEN J. ROTH, Attorney General, Successor to EUGENE F. BLACK, Attorney General, in the name and on behalf of the People of the State of Michigan,
Appellant,

vs.

PRESTON DELANO, Comptroller of the Currency of the United States of America, and

JOSEPH T. CONNOLLY, as Receiver of the First National Bank—Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America,
Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

PRIOR DECISIONS ARE NOT CONTROLLING

Appellant, in his jurisdictional statement filed pursuant to Rule 12, stated the nature of the case and rulings of the Court. Appellee has not controverted any fact thus stated, but has endeavored to imply facts not of record and to draw incorrect inferences from earlier cases in the Sixth Circuit in an effort to claim the present controversy is foreclosed by *res adjudicata*, a defense not

pleaded and in any event not material to the question of this Court's *jurisdiction* on appeal, which is the only question before this Court on the pending motion.

The first of the earlier cases, *Starr vs. O'Connor* (1941), 118 F. 2, 548 (*certiorari* denied 314 U. S. 695), related to a different escheat law of Michigan than the one presently involved. The case was tried on a stipulation of facts covering $1,799,097.66 of bank deposits "upon which no claims had been presented to and accepted by the receiver" (p. 550). *The instant case, on the contrary, relates solely to claims which the depositor filed and had allowed but where he could not later be located to receive dividend checks or, if he did receive the same, has not cashed them for seven years or more* (R. 5, 12-13). (References to the record are to the printed record in the court below filed with this appeal and also to the record in the alternative petition for certiorari pending in this Court, Docket No. 533). The decision in *Starr vs. O'Connor, supra*, was based (p. 566) on *First National Bank of San Jose vs. California*, 262 U. S. 366, on the ground that the then escheat law of Michigan contained provisions conflicting with the National Bank Law. This is the only case involving any Michigan escheat law which this Court has refused to review, the former escheat law of Michigan having contained provisions held unlawful in the *San Jose* case.

The next two cases in the Sixth Circuit, *Rushton vs. Schram*, 143 F. 2, 554, and *Starr vs. Schram*, 143 F. 2, 561, both decided May 31, 1944, did relate to the Michigan escheat law now involved, *but also solely to dormant deposits where no claim had been filed or allowed.* This difference the Court below recognized in the instant cause, stating (R. 101; 170 F. 2, 966, 968):

> "The fact that we encounter here proven claims rather than dormant deposits supplies no logical basis for a declination to apply settled doctrine."

That the court erred in its conclusion we shall later point out. What we now advert to is that the court recognized that a different fact situation existed in the instant cause from that previously passed upon and did not claim

(any more than appellee had) that the new question now involved was *res adjudicata*.

The pleadings in the prior cases made it clear that they concerned only unproven claims. Appellee does not assert otherwise.

When escheat is sought with respect to deposits where the depositor has never filed claim, it may well be argued that the State law does conflict with the National Bank Law (Title 12, U. S. Code, Sec. 194), which requires the Comptroller to "make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction", and which further requires that "the remainder of the proceeds, if any, shall be paid over to the shareholders" of the bank.

Thus a non-proven claim may be foreclosed and payments on proven claims thus augmented or, if a surplus results, the amount otherwise payable on an unproven claim may go to shareholders. This would be analogous to distribution in bankruptcy and equity receiverships. The National Bank Law, in the case of unproven claims, may thus decree a tontine right for the benefit of proven claims and shareholders and foreclose the State's right to succeed to unproven abandoned claims. This may be the correct basis for the decisions of the Court below in the earlier cases relating to unproven claims and one of the reasons for denial of *certiorari* in the only earlier case in which *certiorari* was sought. It was the basis of denying escheat with respect to unproven claims in the case of *In re Commercial National Bank*, 45 Fed. Supp. 482 (E.D. Pa.), affirmed on opinion below 134 F. 2, 172 (C. C. A. 3).

But, as we shall point out, there is no such tontine right prescribed whereby funds payable on proven claims later abandoned go to augment payments to other claimants or to shareholders.

Nevertheless, here the court below refused the State's right of succession to a proven claim, thus in effect permitting it to escheat to the United States, which has no authority over the escheat or other devolution of property. The question presented now is entirely different from the earlier cases below, which decisions are not binding on this Court in any event.

Appellee goes outside the record to imply that a settlement agreement was made pending petitions for *certiorari* in two of the earlier cases involving such different claims and, apparently, that the agreement settled matters not involved in the prior suits. The appellee made no such claim in his pleadings (R. 64-65). A similar statement filed by the appellee in the Court of Appeals was stricken from the record by that court "for the reason that it carries beyond the record in the case and contains argamentative matter not presented consistently with the rules of this court" (R. 97). Nevertheless, appellee attempts again thus to influence the Court on an extraneous matter not in evidence. There is no settlement agreement before the Court in this case and none which we believe has any bearing on the questions now before this Court.

THE STATE ACT WAS HELD INVALID

The sole question on the pending motion is whether appellant was "relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States" (Title 28, U. S. Code, Sec. 1254 (2) as revised).

That appellant was relying on a State statute, viz., the Michigan escheat law, is of course undenied. But appellee contends that the Court of Appeals merely held the statute inapplicable to a national bank in liquidation and not invalid as repugnant to the National Bank Law. Appellee is demonstrably in error.

Appellee repeatedly contended below that the Michigan statute was an unlawful intrusion upon the National Bank Law. To this the court below agreed, although, as we contend, erroneously. In the earlier case of *Rushton vs. Schram*, 143 F. 2, 554, two of the three judges did base their decision as to unproven claims on the ground that the Michigan statute was not retroactive to the seven year period prior to the bank failure, but the third (Simons, C. J.) based his decision on the invalidity of the Michigan statute as repugnant to the National Bank Law, stating (p. 561):

> "I think, however, that the amended Act, at least insofar as it permits the state administrator to exer

> cise powers of visitation and inquisition, and insofar as it imposes penalties upon an agency of the federal government in possession of the assets of an insolvent national bank, operates as an unlawful interference with the liquidation of a national bank provided for in Sec. 194, 12 U. S. C. A., of the National Banking Act. * * * I think the state is not empowered to interfere with it without the government's consent, clearly expressed in Congressional enactment."

The decision of the other two judges was contrary to *Evans Products Company vs. State Board*, 307 Mich. 506. Furthermore, it is not a retroactive application of the Michigan law in the present case of abandonment of proven claims to apply it to antecedent facts, i. e., part of the abandonment period after the claims were proved. *Cox vs. Hart*, 260 U. S. 427, 435. In *Provident Institution for Savings vs. Malone*, 221 U. S. 660, *Anderson National Bank vs. Luckett*, 321 U. S. 233, and *United States vs. Klein*, 303 U. S. 276, escheat laws passed or amended after all or a part of the dormancy period were held properly to embrace such prior periods.

The entire court, apparently recognizing that the reason assigned by Judge Simons was the only ground upon which the decision could be plausibly based, accordingly in *Starr vs. Schram*, 143 F. 2, 561, 562, held:

> "Upon conclusion of the hearing, the district court decreed that the escheat statutes of Michigan, including Act 170 of the Public Acts of Michigan for 1941, which was enacted subsequently to our decision in Starr v. O'Connor, supra, constitute an unlawful interference with the liquidation of an insolvent national bank, and are inapplicable to the receivership in the instant case. The district court's decree to this extent was correct."

The court below in the instant cause pointed out its prior unanimity on this ground (R. 99-100; 170 F. 2, 966, 967) and decided the instant cause expressly "on the merits", stating (R. 100; 170 F. 2, 967):

"The present action brought by the State of Michigan to apply its laws of escheat in the circumstances related constitutes an unlawful interference with the liquidation of a national bank upon the same principles and authority fully discussed in our previous opinions."

Appellee, in support of the alleged correctness of the decision below, cites *Davis vs. Elmira Savings Bank*, 161 U. S. 275, and *Easton vs. State of Iowa*, 188 U. S. 220, both of which held State laws invalid as repugnant to the National Bank Law. Therefore, appellee himself must believe that the decision below was a holding that the Michigan escheat law was invalid as repugnant to the federal law.

If the Michigan law did not "apply" to a national bank in liquidation, the court below could not have found that it constituted "an unlawful interference". It would merely have construed the law to be inapplicable. *An unlawful interference can occur only when a statute does apply but is invalid as repugnant to the federal law.* This is what the court below held and it is from such a holding that right of appeal to this Court is expressly granted by the statute. The court below did not point out, nor can there be discovered in the Michigan law, anything to make it "inapplicable" to a national bank in liquidation. Sec. 13a of the Michigan law (R. 33) provides for escheat to the State when a depositor has any moneys or credits in the possession or control of a depository where no dealings or transactions have been had with respect thereto between the depositor and the depository for seven years or more. Sec. 4b of the Michigan law (R. 20) defines "depository" to include "any person" and defines "person" to include, among other things, a bank and *any* governmental official, receiver, fiduciary or liquidating officer. The statute therefore applies to a national bank in liquidation, but was erroneously held below to be invalid in so doing as repugnant to the National Bank Law.

Appellee's references to cases dealing with appeals from State courts have no bearing on the present appeal. Appeal in such case is available where a State statute is held valid after its validity "is drawn in question" by

the future *appellant* "on the ground of its being repugnant to the Constitution, treaties or laws of the United States" (Title 28, U. S. Code, Sec. 1257(2) as revised). The entire burden is thus upon the appellant; and it has long been the rule that he must clearly raise the issue of validity below and obtain a decision thereon.

An appeal from a Court of Appeals, however, is available to one who has brought an action relying on a State statute, which statute is held repugnant to the Constitution, treaties or laws of the United States (Sec. 1254(2) as revised). Appellant here sought a declaration that the Michigan escheat law applied to a national bank in liquidation and that the appellee was subject to and bound by the law (R. 15). This presented squarely the question of whether the statute was valid State legislation. Appellee claims that he at no time raised the issue of validity of the escheat law. As a matter of fact he claimed below that the State law was an invalid intrusion upon the National Bank Law. But if appellee had not so claimed, this would be irrelevant. If the right to appeal is to rest upon issues raised by the *appellee* and within his power to phrase as he pleases, the appellant's statutory right becomes a nullity. The holding of the Court of Appeals is the sole determining factor under Sec. 1254(2), whether that holding is of the court's own motion or in response to appellee's contention.

The cases cited by appellee with respect to appeals from State courts, even if applicable to the present situation, do not support the contention that appeal will not lie from a State court when a statute is sustained, although attacked because it infringes federal rights. *Charleston Federal Savings & Loan Association vs. Alderson*, 324 U. S. 182; *Memphis Natural Gas Co. vs. Beeler*, 315 U. S. 649; and *Baltimore National Bank vs. Tax Commission*, 296 U. S. 538, are cases where the appellant did not timely contend explicitly below that the statute was invalid, or where administration of the statute was attacked and not the validity of the statute itself. Of course, when the validity of the statute was properly "drawn in question" because of its interference with federal rights, this Court does grant appeals from State courts, as required by the statute. *Lawrence vs. State Tax Commission*, 286 U. S.

276; *State Farm Mutual Ins. Co. vs. Duel*, 324 U. S. 154; *Chassaniol vs. Greenwood*, 291 U. S. 584; *Senn vs. Tile Layers Protective Union*, 301 U. S. 468; *Richfield Oil Corp. vs. State Board*, 329 U. S. 69. The right of appeal accrues when there was properly "drawn in question" a particular unconstitutional application of the State statute rather than the validity of the statute as a whole. *Dahnke-Walker Co. vs. Bondurant*, 257 U. S. 282; *Furst vs. Brewster*, 282 U. S. 493. See also *Fleming vs. Rhodes*, 331 U. S. 100, 103, 108.

Appellee's contention is equally unfounded when he claims that appeals do not lie from a court of appeals where a State statute is held not to be validly applicable because the application would infringe federal rights. Appellee criticizes the cases cited by us in our jurisdictional statement on the ground that in such cases it was held that the State had no power to enact the legislation in question because of federal constitutional prohibition. But that is precisely what happened in the instant cause when the court held the escheat law to be an unlawful interference with liquidation of a national bank under Sec. 194 of the National Bank Law, this being, according to Judge Simons' statement in the earlier case of *Rushton vs. Schram*, 143 F. 2, 554, 561, a thing the State is "not empowered" to do. "*Applicability*" *is the* sine qua non *of "unlawful interference". If the State law was inapplicable, there would have been no interference, unlawful or otherwise.*

While the court below did not hold that Michigan could not enact an escheat law, it did hold that it had no power to enact such a law as applicable to a national bank in liquidation. It is not necessary, however, to hold a statute valid if it is found not to be invalid *in toto*. A statute may be invalid as applied to one state of facts and yet valid as applied to another. *Dahnke-Walker Co. vs. Bondurant*, 257 U. S. 282; *Poindexter vs. Greenhow*, 114 U. S. 270; *St. Louis, etc., Ry. Co. vs. Wynne*, 224 U. S. 354.

Gamble vs. Daniel, 281 U. S. 705 (from 30 F. 2. 447), cited by appellee, does not sustain his position. The holding below did not declare invalid a State insolvency law, but decided merely that upon bankruptcy the State liquidator was properly required to turn over assets to

the bankruptcy trustee. The State law did not provide otherwise. In *Reeves vs. Williamson*, 317 U. S. 593 (from 127 F. 2, 657), also cited by appellee, the holding below did not invalidate the Kentucky tax statute, but merely its attempted administrative application to postal savings not expressly covered by the statute. In the instant cause, the Michigan escheat law expressly covered all banks and receivers thereof, but was erroneously held invalid because of its alleged interference with national banks. When validity of the same Kentucky statute was drawn in question in a case where, by its terms, the law applied to out-state deposits, this Court did allow an appeal. *Madden vs. Kentucky*, 309 U. S. 83.

In any event, cases of appeal from Courts of Appeal decided before the Act of June 25, 1948, are no longer completely controlling. *Congress has enlarged the right of appeal from such courts.* Prior to the recent revision, Sec. 240 (b) of the Judicial Code (28 U. S. Code, Sec. 347) confined the right of appeal to cases where the validity of the State statute "is drawn in question", the same words used with respect to appeals from State courts. But as revised in the present Sec. 1254(2), the requirement for appeal is merely that the State statute relied on be held to be invalid under federal law. It is no longer material whether such validity "was drawn in question" by the appellee. Thus *an appellee* can no longer seek to prevent an appeal by the way he phrases his pleading. The sole criterion is the holding of the Court of Appeals.

Nor is appellee correct in his reliance upon *P. J. Carlin Construction Co. vs. Heaney*, 298 U. S. 637, *Bradford Electric Light Co. vs. Clapper*, 284 U. S. 221, and *North Dakota vs. Olson*, 280 U. S. 528, in support of the contention that the instant cause involves merely the question of which of two statutes applies. There was no real conflict between the statutes in the cited cases. But in the instant cause there was found to be a direct clash, in that the one was held "unlawfully to interfere" with the other. This case is precisely like *RFC vs. Beaver County*, 328 U. S. 204, where this Court denied a motion to dismiss appeal in a case where the application of a Pennsylvania tax statute was claimed to conflict with the RFC statute. This case is directly controlling here.

THE NECESSARY PARTY IS BEFORE THE COURT

Appellee claims that an alleged necessary party, the Comptroller of the Currency, is not before the Court. This is an abrupt about face by appellee, the Comptroller in an earlier case having obtained his dismissal because he was an unnecessary party. The Court of Appeals stated in *Starr vs. O'Connor*, 118 F. 2, 548, 550:

> "The attorney general of Michigan filed the suit on behalf of the state against the receiver of the First National Bank — Detroit and the Comptroller of the Currency of the United States, the latter of whom was dismissed on motion as an unnecessary party."

This playing fast and loose with the courts avails appellee nothing. The claim is based on the contention (R. 64-65) that suit could not be brought against the receiver alone because, under Sections 192 and 194 of the National Bank Law, the receiver pays the money to the Comptroller and the latter pays the dividend. But a long line of decisions has sustained suits against receivers with respect to claims against national banks, even though the Comptroller is not a party and is the one who pays the dividend. *Case vs. Bank*, 100 U. S. 446; *Armstrong vs. American Exchange National Bank*, 133 U. S. 433; *Earle vs. Conway*, 178 U. S. 456; *Merrill vs. National Bank of Jacksonville*, 75 Fed. 148 (C. C. A. 5), affirmed without discussing the point, 173 U. S. 131; *American Surety Company vs. Bethlehem National Bank*, 314 U. S. 314. As stated in *Taylor vs. Spurway*, 72 F. 2, 97, 99 (C. C. A. 5):

> "If it should transpire that the receiver has no funds to respond to a judgment, it must be assumed that the Comptroller, although beyond the reach of process of the court rendering the judgment, will give effect to a valid judgment of a court of competent jurisdiction. *Earle v. Pennsylvania*, 178 U. S. 449."

The fact that funds payable to bondholders had been covered into the Treasury was held in *United States vs. Klein*, 303 U. S. 276, not to deprive the state court of

jurisdiction to declare such funds escheated under the Pennsylvania escheat statute.

Under the above decisions, the bank receiver is accountable to claimants. He is also accountable to the Comptroller. By Sec. 6 of the Michigan law (R. 21), escheat reports are required from "depositories indebted or accountable to any other person." The Michigan statute covers the situation squarely. The court below did not imply the contrary.

Nor does the fact that the appellee claimed the receivership was closed make any difference. He was alleged to have been appointed and to be acting as receiver (R. 3-4), which averment was admitted by defendant's motion to dismiss. Although in an affidavit annexed to the motion appellee claimed that the receivership was "deemed technically closed" (R. 70), the same affidavit discloses (R. 72) that defendant Connolly was given a commission as receiver "to act in such incidental cases that might require action by a receiver". This is one of such cases. Furthermore, after the institution of suit *the receiver as such* entered into a stipulation permitting him to send records to the Comptroller without prejudice to the issues involved (R. 48).

THE DECISION BELOW IS ERRONEOUS

We had wished not to argue the errors of the court below, when the sole question before the Court now is one of jurisdiction. But, appellee having done so, we shall cover the matter briefly.

In the prior cases involving unproven claims, the Court of Appeals' decisions may have been correct if the statute gives a tontine right whereby proven claims profit from dividends which would have been payable on unproven claims. But Sec. 194 of the National Bank Law does not prescribe a tontine right whereby funds payable on proven claims, later abandoned, go to augment payments to other claimants or to shareholders. Cf. *Provident Institution for Savings vs. Malone*, 221 U. S. 660, 665, and *Security Savings Bank vs. California*, 263 U. S. 282, 286. Payments, by the law, must be made ratably on proven

claims. *Merrill vs. National Bank of Jacksonville*, 173 U. S. 131, 143; *American Surety Co. vs. Bethlehem National Bank*, 314 U. S. 314, 317. The appellee has never claimed otherwise, but merely that such money must be held indefinitely in the United States Treasury until the claimant appears, if ever, the United States keeping the same if the claimant never appears. No federal law provides for court proceedings and publication of notice to locate a disappeared claimant or his successors.

The National Bank Law (Sec. 194) requires payment on proven *claims*, not necessarily to the *claimant*. Thus a successor to an original claimant, by assignment, attachment, subrogation, or administration of his estate, is held entitled to stand in the original depositor's shoes. *Earle vs. Conway*, 178 U. S. 456 (attachment of deposit in insolvent national bank); *American Surety Co. vs. Bethlehem National Bank*, 314 U. S. 314 (subrogation to depositor in insolvent national bank); see also *Provident Institution for Savings vs. Malone*, 221 U. S. 660, 665, and *Anderson National Bank vs. Luckett*, 321 U. S. 233, 252.

The State has sole power over abandoned property just as it does over other transfers and devolution of property (*Anderson National Bank vs. Luckett*, 321 U. S. 233, 240-241, 248) and hence proper escheat laws apply to banks, whether State or national. *Provident Institution for Savings vs. Malone, supra; Anderson National Bank vs. Luckett, supra; Security Savings Bank vs. California, supra.*

Nor does the fact that insolvent national bank funds are paid to the Comptroller and by him covered into the Treasury (Sec. 192 of the National Bank Law) mean that the escheat law is repugnant to the federal law. In *United States vs. Klein*, 303 U. S. 276, the Pennsylvania escheat law was held applicable to funds deposited in a federal court suit, although the same had been covered into the Treasury as required by federal statute.

No valid reason exists, or was even suggested by the court below, why the Michigan escheat law, in the case of a proven claim, should not apply to national banks, whether closed or open, as this Court has held subrogation, attachment, and other assignment and devolution to apply, or in what respect the same would be repugnant to the

National Bank Law. The Michigan law does not infringe the National Bank Law, but is impartial, applying to all banks and other depositories without discrimination as to national banks. The bank and its receiver should perform their duty and pay the abandoned deposits to the State of Michigan, to be held for the depositors or their successors if ascertained. Cf. *Anderson National Bank vs. Luckett*, 321 U. S. 233, 248-249, 252.

The cases permitting application of State escheat laws to national banks are merely examples of the general principle that such banks are subject to State laws which do not interfere with the purposes of their creation or tend to impair their efficiency as federal agencies. *National Bank vs. Commonwealth*, 9 Wall. 353; *McClellan vs. Chipman*, 164 U. S. 347; *First National Bank vs. Missouri*, 263 U. S. 640, 656.

To apply State escheat laws to proven claims later abandoned, whereby the State as successor to the claimant holds the money for the owner if found, interferes neither with the purposes nor the efficiency of national banks. It merely prevents the United States Treasury from keeping indefinitely money it admittedly owes proven claimants, which the United States has no power to escheat.

THE CASE INVOLVES A SUBSTANTIAL QUESTION

Appellee denies neither the large amount here involved nor the increasing importance of escheat laws, particularly in relation to banks and banks in liquidation.

But appellee claims that Michigan has since passed a new escheat law, although with a saving clause keeping the law here involved applicable to pending suits. But appellee does not and cannot point out wherein the new Michigan law differs as to questions here involved. Both laws have all the safeguards approved in *Anderson National Bank vs. Luckett*, 321 U. S. 233, and *Security Savings Bank vs. California*, 263 U. S. 282. No question of due process of law has been or can validly be raised against either statute, the depositor or his successor being given the right *at any time* to obtain the money from the State (Sec. 22; R. 36-37).

It is not correct that this Court, if it determines the Michigan law not to be invalid as repugnant to federal law, cannot decide the remaining minor questions, such as that suit may be properly maintained against the receiver. The minor questions are also federal questions and on an appeal the scope of review given this Court by Sec. 1254(2) covers all federal questions presented, not merely the question of validity.

A decision of this Court will settle, not only for Michigan but for other States having valid escheat laws, the question of whether national banks in liquidation must comply with such laws relating to proven claims, just as those not in liquidation are required to do, or whether the federal government may in effect escheat money to itself, although that Government has no power over escheats or other devolution of property and has no proceedings for administration of estates and court advertisement in order to locate the claimants. It is time that the doctrine asserted by the Court of Appeals be reviewed here and reversed, inasmuch as it is contrary to the settled doctrine of this Court as to the validity of State laws applying to national banks which do not interfere with the purposes or efficiency of the banks.

Respectfully submitted,

STEPHEN J. ROTH,
Attorney General,
EDMUND E. SHEPHERD,
Solicitor General,
ARCHIE C. FRASER,
Assistant Attorney General,

State Capitol,
Lansing 2, Michigan,

JULIUS H. AMBERG,
Special Asst. Attorney General,
500 Mich. Trust Bldg.,
Grand Rapids 2, Michigan,

Attorneys for Appellant.